- *Designated counsel.* The court may award fees to lead counsel, liaison counsel, and other attorneys designated to perform tasks on behalf of a group of litigants (see section 10.22).[476]
- *Objectors.* The court may award fees to objectors who provided services that contributed to an increase in the common fund available to a class, that aided the court's review of a class-action settlement, or that otherwise advanced the interests of the class or assisted the court.[477]
- *Special parties.* Under the common law and many state statutes, court approval is required for the payment of fees charged by counsel for minors, incompetents, and trusts.
- *Sanctions.* The court has inherent power to award fees against a litigant who conducts litigation in bad faith or vexatiously.[478] A statutory counterpart, 28 U.S.C. § 1927, provides for awards against an offending attorney. Various provisions of the Federal Rules of Civil Procedure authorize the award of fees against parties who have failed to comply with rules or orders with respect to discovery and other pretrial proceedings. Section 10.15 has a detailed discussion of sanctions.

14.12 Common-Fund Cases

14.121 Percentage-Fee Awards

The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment.[479] The exception applies where a common fund has been created by the efforts of a plaintiff's attorney[480] and rests on the principle that "persons

476. *In re* Air Crash Disaster, 549 F.2d 1006, 1016 (5th Cir. 1977) (relying on "common-fund" principles and inherent management powers of court in complex litigation); *see also infra* section 20.312 and text accompanying notes 700–05 (discussing the relationship between fee allocations in multidistrict litigation and state–federal cooperation).

477. *See* Fed. R. Civ. P. 23(e)(4), 23(h) & committee notes; *infra* sections 21.723 (role of objectors), 21.71 (criteria for approval of fee requests).

478. Chambers v. NASCO, Inc., 501 U.S. 32 (1991); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258–59 (1975); Ellingson v. Burlington N., Inc., 653 F.2d 1327, 1332 (9th Cir. 1981).

479. Trs. of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 536 (1882).

480. *Compare* Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984), *and* Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991), *and Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237 (1985) [hereinafter *Third Circuit 1985 Task Force Report*], *with*

who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."[481] Historically, attorney fees were awarded from a common fund based on a percentage of that fund.[482] After a period of experimentation with the lodestar method (based on the number of hours reasonably expended multiplied by the applicable market rate for the lawyer's services), the vast majority of courts of appeals now permit[483] or direct[484] district courts to use the percentage-fee method in common-fund cases. The only court of appeals that has not explicitly adopted the percentage method seems to allow considerable flexibility in approving combined percentage and lodestar approaches.[485]

Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976).

481. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). *See also* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392 (1970).

482. *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). The rationale differs significantly from that on which statutory-fee awards rest. *See* Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) ("[S]tatutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights."). *See also In re* SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 532 (E.D. Pa. 1990).

483. For a circuit-by-circuit review, see Alba Conte, Newburg on Class Actions app. 14-1 (Supp. June 2002). The following seven courts of appeals permit awarding fees by either the percentage-fee or lodestar method or both (generally using the lodestar as a cross-check): *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award simulating "what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character" would be appropriate); *Brown*, 838 F.2d at 454 (Tenth Circuit case).

484. The following three courts of appeals direct district courts to use the percentage-fee method, sometimes supplemented with a lodestar "check": *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821–22 (3d Cir. 1995); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I*, 946 F.2d at 774. *See also In re* Cendant Corp. Prides Litig., 243 F.3d 722, 742 (3d Cir. 2001) (directing the district court to apply a lodestar cross-check and to award fees with a multiplier no greater than three); *cf. In re* Cendant Corp. Litig., 264 F.3d 201, 285 (3d Cir. 2001) (stating that the "lodestar cross-check . . . is very time consuming" but the district court may use it "if necessary").

485. Longden v. Sunderman, 979 F.2d 1095, 1099–1100 (5th Cir. 1992) (indicating that the circuit "has yet to adopt this [percentage of common-fund] method" and affirming a district judge's use of a combined lodestar and percentage-of-fund approach). *See also* Strong v. BellSouth Telecomms., Inc. 137 F.3d 844, 852–53 (5th Cir. 1998) (approving application of lodestar and stating that application of a percentage-of-fund approach could be restricted to a percentage of claims actually made by class members and not the total amount that might be claimed). The

In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended.[486] The percentage method also has been criticized as arbitrary, especially "when applied by courts in an automatic fashion."[487] Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.[488] Several courts have established benchmarks, either a specific figure or a range, subject to upward or downward adjustment depending on the circumstances of the case. Awarding attorneys 25% of a common fund represents a typical benchmark.[489] Any single rate, however, is arbitrary and cannot capture variations in class actions' characteristics. A fixed benchmark will often yield fee awards that are excessive for certified class actions in which the risk of non-recovery is relatively small.[490]

Accordingly, in "mega-cases" in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate.[491] One court's survey of fee

practice of many district judges in the Fifth Circuit appears to be to use either the percentage approach or both methods. *See, e.g., In re* Catfish Antitrust Litig., 939 F. Supp. 493, 500 (N.D. Miss. 1996), and cases cited therein (applying a percentage-of-fund method and discussing the *Johnson* factors that courts in the Fifth Circuit typically apply in lodestar analyses). For further discussion of the *Johnson* factors, see *infra* note 509.

486. *Third Circuit 1985 Task Force Report*, *supra* note 480, at 248 (finding that "there appears to be a conscious, or perhaps unconscious, desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar").

487. *Third Circuit 2001 Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 707 (2001) [hereinafter *Third Circuit 2001 Task Force Report*].

488. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69, 146–47 figs.67 & 68 (Federal Judicial Center 1996) [hereinafter FJC Empirical Study of Class Actions]; *see also, e.g., In re* Pac. Enters. Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (25% with adjustments up to 33% for complexity, risk, and nonmonetary results).

489. *See* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (adopting 25% benchmark). Several other courts of appeals have endorsed variations of the 25% benchmark. *See, e.g.*, *Swedish Hosp.*, 1 F.3d at 1272 (affirming that a 20% award is within the range of reasonable fees in common-fund cases, since the majority fall between 20% and 30%); *see also* cases cited *infra* note 498.

490. FJC Empirical Study of Class Actions, *supra* note 488, at 60 (finding settlement rates for certified class actions ranging from 62% to 100% in four federal district courts).

491. *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 339–40 (3d Cir. 1998), and cases cited therein (award constituting 6.7% of common fund remanded "for a more thorough examination and explication of the proper percentage to be awarded to class counsel . . . in light of the magnitude of the recovery").

awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.92%.[492] Likewise, judges who have used competitive bidding to select counsel and establish the terms for attorney fee awards have produced percentage-of-recovery awards considerably lower than the 20%–30% average award reported above.[493]

Two courts of appeals have rejected benchmark percentages, preferring more qualitative standards.[494] Benchmarks are subject to considerable fluctuation and should be applied, if at all, with the caveat that "[t]he benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."[495] The Third Circuit 2001 Task Force on Selection of Class Counsel recommended that courts "avoid rigid adherence to a 'benchmark'" and concluded that "a percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel."[496]

The application of a benchmark percentage for unusually large funds may result in a windfall.[497] In that circumstance, some courts have used a sliding scale, with the percentage decreasing as the magnitude of the fund increases,[498]

492. *Id.* at 339.

493. *See* Laural L. Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study pt. VII (Federal Judicial Center Aug. 29, 2001), *reprinted in* 209 F.R.D. 519, 595–97 tbl.4, 598 (2001) (finding in nine terminated bidding cases that the fee awards ranged from 5% to 22%, with 8% being the median award).

494. *In re* Cendant Corp. Prides Litig., 243 F.3d 722, 736–37 (3d Cir. 2001) (district court may not rely on a formulaic application of the appropriate range in awarding attorney fees under the percentage-of-fund method in a class action, but must consider the relevant circumstances of the particular case, including the size of the settlement); Goldberger v. Integrated Res., Inc., 209 F.3d 43, 51–52 (2d Cir. 2000) ("We are nonetheless disturbed by the essential notion of a benchmark. . . . [M]arket rates, where available, are the ideal proxy for [attorney] compensation.").

495. Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

496. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 705.

497. *See In re* Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1297–98 (9th Cir. 1994); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 350–51 & nn.75, 76 (N.D. Ga. 1993), and cases cited therein (listing declining percentages based on case law).

498. *See In re* First Fid. Bancorporation Sec. Litig., 750 F. Supp. 160 (D.N.J. 1990) (30% of first $10 million, 20% of next $10 million, 10% of any recovery greater than $20 million); Sala v. Nat'l R.R. Passenger Corp., 128 F.R.D. 210 (E.D. Pa. 1989) (33% of first $1 million, 30% of amount between $1 million and $2 million); *Third Circuit 1985 Task Force Report*, *supra* note 480, at 256. *But see In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 79–81, 84 (S.D.N.Y. 2000) (discussing decreasing and increasing fee scales and choosing a fee scale with a single increment, from 0% below a certain recovery—the "X factor"—to 25% for all amounts above that

or they have used the lodestar method.[499] Where the fund is unusually small or where actual common benefits are difficult to determine and possibly illusory, a benchmark (or any award based on a percentage of recovery) may likewise be inapplicable. Particularly where the common benefits are in the form of discounts, coupons, options, or declaratory or injunctive relief, estimates of the value or even the existence of a common fund may be unreliable, rendering application of any percentage-of-recovery approach inappropriate.[500] Where there is no secondary market for coupon redemption, the judge can conclude that the stated value of the coupons is misleading and does not provide a sufficiently firm foundation to support a fee award. Awarding fees in the form of a percentage of the coupons themselves may give attorneys an incentive to ensure that a secondary market becomes available to convert the benefits into cash.[501] Alternatively, courts can award fees as a percentage of coupons actually redeemed by class members.[502] Where payment of a common benefit is scheduled to take place in the future, consider linking the attorney-fee award to that future payment.[503]

level); *In re* Am. Cont'l Corp. Lincoln Sav. & Loan Sec. Litig., MDL No. 834 (D. Ariz. July 24, 1990) (25% of first $150 million, 29% of any recovery greater than $150 million plus additional incentives for prompt resolution of case); Milton I. Shadur, *Response: Task Force Report: "Against the Manifest Weight of the Evidence,"* 74 Temp. L. Rev. 799, 803 (2001) (discussing use of an absolute cap on fees). The Third Circuit 2001 Task Force identified adherents of both decreasing and increasing percentages and concluded that either approach might reasonably be used. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 719.

499. *In re Wash. Pub. Power*, 19 F.3d 1291 (9th Cir. 1994).

500. *See, e.g.*, Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 851–52 (5th Cir. 1998) (upholding district court's use of lodestar based on finding "insignificant benefit" to class member in "phantom" common fund asserted to be worth $64 million); *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) (stating that "the lodestar rationale has appeal where as here, the nature of the [coupon] settlement evades the precise evaluation needed for the percentage of recovery method"); Weinberger v. Great N. Nekoosa Corp. 925 F.2d 518, 526 n.10 (1st Cir. 1991) (upholding the "district court's implied premise that the lodestar is the soundest available alternative").

501. *See, e.g., In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648, 2001 WL 170792, at *3–*5, *15–*17 (S.D.N.Y. Feb. 22, 2001) (discussing initial agreement on coupons and changes made after court-appointed experts reported on value of coupons; counsel fees paid in same proportion of cash and coupons as class benefits paid).

502. *Third Circuit 2001 Task Force Report*, *supra* note 487, at 693 n.12 (quoting Brian Wolfman's testimony that "'[b]y tying counsel's fate to that of their clients, the typical coupon settlement would become a thing of the past'").

503. *See, e.g.,* Bowling v. Pfizer, 132 F.3d 1147, 1152 (6th Cir. 1998) (portion of fees related to future funding to be determined and paid after the fund is created, over a ten-year period, using lodestar method).

A number of courts favor the lodestar as a backup or cross-check on the percentage method when fees might be excessive.[504] To use the lodestar method, the court should give the attorneys early notice that they should keep track of their time. (At least one court has discontinued using the lodestar as a check on the reasonableness of percentage awards because of the lodestar method's perceived faults.[505])

In securities fraud and other types of cases in which a large fund is likely, some district judges have used competitive bidding to aid in selecting class counsel and determining a proposed percentage fee.[506] See section 21.27. Others, however, have concluded that competitive bidding is incompatible with the Private Securities Litigation Reform Act of 1995. See section 31.31. In addition, one court of appeals has minimized one advantage of competitive bidding by ruling that a fee percentage established at the outset of the case must be reviewed at the conclusion of the case, using traditional factors governing such awards. Section 14.211 further discusses bidding.

The decision of an award of attorney fees in a common-fund case is committed to the sound discretion of the trial court, which must consider the unique contours of the case.[507] Reasons for the selection of a given percentage must be sufficiently articulated for appellate review. The court should identify relevant factors and how these factors helped determine the percentage awarded.[508] The factors used in making the award will vary,[509] but may include one or more of the following:

504. Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) ("encourag[ing] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage"); United States v. 8.0 Acres of Land, 197 F.3d 24, 33 (1st Cir. 1999) (holding that a lodestar-calculated fee amounted to a reasonable percentage of the common fund); Bowling v. Pfizer, Inc., 102 F.3d 777, 780 (6th Cir. 1996) (upholding a district court fee award based on a percentage of the common fund and then cross-checked against the class counsel's lodestar); *In re Gen. Motors Corp.*, 55 F.3d at 820 (finding it "sensible for a court to use a second method of fee approval to cross check its conclusion under the first method").

505. Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1266–67 & n.3 (D.C. Cir 1993) (citing *Third Circuit 1985 Task Force Report*, *supra* note 480, at 246–49).

506. For a description of the characteristics of the cases in which competitive bidding has been used to date, see Hooper & Leary, *supra* note 493, pt. III, *reprinted in* 209 F.R.D. at 529–38 & tbl.1.

507. Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); Brown v. Phillips Petroleum Co., 838 F.2d 451, 453 (10th Cir. 1988). For an overview of factors to consider in determining the amount of attorney fees to award in class-action litigation, see Fed. R. Civ. P. 23(h) committee note; *see also infra* section 21.7.

508. *Camden I*, 946 F.2d at 775. *See also* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272–73 (9th Cir. 1989).

- the size of the fund and the number of persons who actually receive monetary benefits;[510]
- any understandings reached with counsel at the time of appointment concerning the amount or rate for calculating fees; any budget set for the litigation; or other terms proposed by counsel or ordered by the court;
- any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation;[511]
- any substantial objections to the settlement terms or fees requested by counsel for the class by class members (it is, however, a court's duty to scrutinize applications for fees, independently of any objection")[512]—in the appropriate case, a court has authority to award fees to an objector that assists the court in scrutinizing the settlement, the fee requests, or both;[513]
- the skill and efficiency of the attorneys;
- the complexity and duration of the litigation;
- the risks of nonrecovery and nonpayment;

509. In *Brown*, the Tenth Circuit endorsed the use of the *Johnson* factors in determining a reasonable percentage fee. 838 F.2d at 454–55 (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974)). Similarly, the Eleventh Circuit instructed the district courts within that circuit to apply the *Johnson* factors plus other pertinent factors. *Camden I,* 946 F.2d at 775. In contrast, the Ninth Circuit established a 25% benchmark for such awards, subject to upward or downward adjustment "to account for any unusual circumstances involved in [the] case." *Graulty*, 886 F.2d at 272. *See also In re* RJR Nabisco, Inc. Sec. Litig., MDL No. 818, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992) ("What should govern such awards is . . . what the market pays in similar cases.").

510. *See* cases cited *supra* notes 500, 503 (*Strong*, *General Motors*, *Weinberger*, and *Bowling*). In *Strong,* the district court examined the actual value of telephone usage credits requested under the settlement and found them to be $1.7 million, far below the parties' valuation of $64 million. *Strong*, 137 F.3d at 851. For approaches to reviewing and determining the value of in-kind settlements, see generally Note, *In-Kind Class Action Settlements,* 109 Harv. L. Rev. 810, 823–26 (1996). *See also* the Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6) (2000) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

511. Rule 23(e)(2); *see infra* section 21.631; Fed. R. Civ. P. 54(d)(2)(B).

512. Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328–29 (9th Cir. 1999). *See In re* Cendant Corp. Prides Litig., 243 F.3d 722, 743–44 (3d Cir. 2001) (directing district court to evaluate the objector's contribution to the ultimate fee and to award compensation to that extent); Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1285 (S.D. Ohio 1996) (awarding $105,037.46 to a public interest group that objected to the settlement and provided "extensive" and "invaluable" objections to the fee applications).

513. *In re Cendant Corp*., 243 F.3d at 743–44.

- the amount of time reasonably devoted to the case by counsel; even where fees are to be awarded on a percentage-of-fund basis, some judges cross-check the percentage by conducting a modified lodestar analysis;[514] and
- the awards in similar cases.

Unlike a statutory-fee analysis, where the lodestar is generally determinative,[515] a percentage-fee award sometimes gives little weight to the amount of time expended. Attorneys' hours may be one of many factors to consider.[516] Indeed, one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation.[517] Generally, the factor given the greatest emphasis is the size of the fund created, because "a common fund is itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded."[518]

14.122 Lodestar-Fee Awards

Judges award attorney fees in some common-fund cases based on the lodestar or a combination of the percentage-of-fund and other methods. The lodestar is at least useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.[519]

514. *See id.* at 735.

515. *See* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); *see also infra* section 14.122.

516. Brown v. Phillips Petroleum Co., 838 F.2d 451, 456 (10th Cir. 1988).

517. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338–39 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment); *Third Circuit 1985 Task Force Report*, *supra* note 480, at 248.

518. 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 14:6, at 547, 550 (4th ed. 2002). *See also* Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); *Brown*, 838 F.2d at 456.

519. *See, e.g.*, *In re Cendant Corp.*, 243 F.3d at 724, 742 (finding multipliers ranging from 1.35 to 2.99 in past years compared with a multiplier of 7–10 in a common-fund case in which counsel was selected by bidding); *cf. In re* Comdisco Sec. Litig., 150 F. Supp. 2d 943, 947 (N.D. Ill. 2001) (criticizing the use of lodestar for cross-checking to reduce the fee of counsel selected by bidding).

When the fund is unusually large, the lodestar may be more appropriate than the percentage method.[520] In these unique mega-cases, selection of percentage figures, even on a sliding scale, may be arbitrary because of the absence of comparable cases.[521] As with percentage fees, an award of attorney fees under the lodestar method should fairly compensate the attorney for the reasonable value of services rendered, given the circumstances of the particular case.[522]

The lodestar method may also be appropriate for distributing fees out of a common fund created to compensate attorneys, e.g., payment of lead counsel in a multidistrict consolidation or a nationwide settlement of mass tort litigation. Some cases may call for allocation of fees among different sets of plaintiffs' lawyers, such as those designated to serve on a steering committee (and entitled to compensation for that service) and those who represent individual plaintiffs. Because compensation directed to any group of attorneys will reduce the amount available to satisfy other contingent fee arrangements, the court should attempt to resolve conflicts between these groups in determining a fair allocation.[523]

The lodestar calculation begins with multiplying the number of hours reasonably expended by a reasonable hourly rate.[524] The number of hours reasonably expended and the reasonable hourly rate must be supported by adequate records and other appropriate evidence; therefore, counsel intending to seek a fee award should maintain specific and adequate time records.[525] Failure to keep contemporaneous time records may justify an appropriate reduction in

520. *See In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1297 (9th Cir. 1994).

521. *See, e.g., In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 340 (3d Cir. 1998) (indicating that hypothetical percentage-fee arrangements do not "provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion").

522. *See* Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973).

523. *See In re* Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603 (1st Cir. 1992).

524. Blum v. Stenson, 465 U.S. 886, 897 (1984); Hensley v. Eckerhart, 461 U.S. 424, 430 (1983). A number of the additional factors set forth in *Johnson* will usually be subsumed in the determination of the reasonableness of the time spent and the hourly rate.

525. *See, e.g.*, *In re* Cont'l Ill. Sec. Litig., 572 F. Supp. 931, 934 (N.D. Ill. 1983) (requiring in a pretrial order that attorneys organize and report their time by activity, not by attorney), *rev'd on other grounds*, 962 F.2d 566 (7th Cir. 1992); *see also* Hirsch & Sheehey, *supra* note 466, at 103–04; Thomas E. Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial 30–32 (Federal Judicial Center 1984) [hereinafter Judicial Regulation] (reporting outside attorneys' enthusiastic support for this aspect of the district judge's order).

the award.[526] In especially large cases, consider seeking additional staff to review fee petitions and uncover duplicative, excessive, or unproductive efforts,[527] or appointing a special master under Rule 54(d)(2)(D).

What constitutes a reasonable hourly rate varies according to geographic area and the attorney's experience, reputation, practice, qualifications, and customary charge. The rate should reflect what the attorney would normally command in the relevant marketplace.[528] In exceptionally complex national litigation, the court should consider establishing a national rate for all the attorneys.[529] Federal Rule of Civil Procedure 54(d)(2)(D) allows establishment of "special procedures to resolve fee issues without extensive evidentiary hearings." Such procedures might include "a schedule reflecting customary fees or factors affecting fees within the community."[530]

The lodestar figure may be adjusted, either upward or downward,[531] to account for several factors including, *inter alia*, the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues pre-

526. *Hensley*, 461 U.S. at 433. Some circuits require contemporaneous time records as a condition to an award of fees. *See* 5th Cir. R. 47.8.1 (absent contemporaneous records, fee based on minimum time necessary); N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983); Nat'l Ass'n of Concerned Veterans v. Sec'y of Def., 675 F.2d 1319 (D.C. Cir. 1982).

527. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1319 (E.D.N.Y. 1985) (describing work of three temporary law clerks); Hirsch & Sheehey, *supra* note 466, at 114–15. For a study of the use of professional staff to review attorney fee vouchers and occasionally to negotiate budgets with attorneys, see Tim Reagan et al., The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration (Federal Judicial Center Apr. 2001) (unpublished report, on file with the Federal Judicial Center). *See also* Alan J. Tomkins & Thomas E. Willging, Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts (Federal Judicial Center 1986).

528. *Blum*, 465 U.S. at 895 ("'[R]easonable fees' . . . are to be calculated according to the prevailing market rates in the relevant community . . . ."); Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

529. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 226, 232 (2d Cir. 1987) (holding that "in an exceptional multiparty case . . . public policy and administrative concerns call for the district court to be given the necessary flexibility to impose a national hourly rate when an adequate factual basis for calculating the rate exists"); *cf. In re* Fine Paper Antitrust Litig., 751 F.2d 562, 591 (3d Cir. 1984) (rejecting national rates as incompatible with a lodestar approach to fees). *See also Third Circuit 1985 Task Force Report*, *supra* note 480, at 261 (recommending use of national rates in exceptional cases).

530. Fed. R. Civ. P. 54(d)(2)(D) committee note (1993 amendments); *see also Third Circuit 1985 Task Force Report*, *supra* note 480, at 260–62 (advocating steps to create uniform district-wide fee schedules).

531. *See* Conte & Newberg, *supra* note 518, § 14:5, at 541–42.

sented, the risk of nonpayment,[532] and any delay in payment.[533] Accurate computation requires an adjustment for the loss of the use of the money up to the time of the award,[534] and perhaps an award of interest.[535] Historic interest rates generally are a more accurate starting point than current rates,[536] but it is permissible to use current rates as a rough approximation of the adjustment needed to compensate for delay in payment.[537] Whether enhancements for the risks assumed by plaintiffs' attorneys are permissible in common-fund cases was unresolved as of publication of this manual.[538]

14.13 Statutory-Fee Cases

The analysis of attorney fees in a statutory-fee (or fee-shifting) case differs from that in a common-fund case.[539] Shifting fees in a statutory-fee case serves the public policy of encouraging private enforcement of statutory or constitutional rights. Under most fee-shifting statutes, fees are available to a "prevailing party." In *Buckhannon*, the Supreme Court said a prevailing party is a party that has altered its legal relationship with its adversary through a judgment or consent decree entered by the court.[540] (A litigant's status as the beneficiary of an out-of-court settlement, or as the beneficiary of an adversary's voluntary action mooting a case, does not by itself entitle that litigant to an award of at-

532. *See In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291 (9th Cir. 1994).

533. *See generally* Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976). *But see* Burlington v. Dague, 505 U.S. 557 (1992) (barring use of multiplier in statutory-fee case). Some courts have held this bar to be inapplicable in common-fund cases. *In re Wash. Pub. Power*, 19 F.3d at 1299–1300.

534. Missouri v. Jenkins, 491 U.S. 274, 283–84 (1989). For a comprehensive study of the *Jenkins* case and a case-based formula for achieving an integrated approach to the issues of prejudgment and postjudgment interest, see Russell E. Lovell II, Court-Awarded Attorneys' Fees: Examining Issues of Delay, Payment, and Risk (1999).

535. *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992).

536. Lovell, *supra* note 534, at 88–92.

537. *Jenkins*, 491 U.S. at 283–84.

538. *See Burlington*, 505 U.S. at 561, 567 (no enhancement in statutory-fee cases).

539. *See* Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984).

540. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 604 (2001) ("enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989))).